

STATE OF MICHIGAN
COURT OF APPEALS

CATHERINE DEWAN,

Plaintiff-Appellant,

v

ELIE G. KHOURY, M.D., ORTHOPEDIC
SURGERY OF MICHIGAN, and ST. MARY'S
MERCY HOSPITAL, a/k/a TRINITY HEALTH
SYSTEM,

Defendants-Appellees.

UNPUBLISHED

March 28, 2006

No. 265020

Wayne Circuit Court

LC No. 04-437134-NH

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants in this medical malpractice case. We affirm.

On June 4, 2002, plaintiff underwent knee surgery performed by defendant Khoury at defendant St. Mary's Mercy Hospital. Complications ensued, requiring further treatment.¹ On June 4, 2004, plaintiff served a notice of intent (NOI) to file a medical malpractice action, as required by MCL 600.2912d. Thereafter, plaintiff was required to wait 182 days before filing suit, unless no response to the notice was received after 154 days. MCL 600.2912b(1). During the time period relevant to this case, the filing of a NOI tolled the statute of limitations for 182 days. MCL 600.5856(d).² The 182-day period ended on Friday, December 3, 2004. Plaintiff filed suit on Monday, December 6, 2004.

¹ The alleged medical malpractice occurred on June 4, 2002; therefore, plaintiff's cause of action accrued on that date. MCL 600.5838a(1); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997). The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). The limitations period for plaintiff's cause of action expired on June 4, 2004. See MCR 1.108(3).

² 2004 PA 87, effective April 1, 2004, rewrote MCL 600.5856. The amended version of the statute does not apply in this case.

Khoury and his professional corporation, Orthopedic Surgery of Michigan, moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's complaint was barred by the statute of limitations. Khoury asserted that the statute of limitations tolling provision extended the time period in which plaintiff could file suit until December 3, 2004, but that the action was untimely because plaintiff did not file suit until December 6, 2004. St. Mary's concurred in Khoury's motion. The trial court agreed and granted the motion, and subsequently denied plaintiff's motion for reconsideration.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Absent a disputed factual issue, the determination whether a claim is barred by the expiration of a limitations period is a question of law subject to de novo review. *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002).

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. She asserts that by holding that her complaint, filed the next business day after expiration of the entire 182-day period, was untimely, the trial court shortened the NOI period to 181 days. Plaintiff contends that the filing of the NOI before midnight on June 4, 2004, left part of the day remaining, and thus left a portion of the statute of limitations unexpired. She concludes that because a portion of the statute of limitations was remaining on Monday, December 6, 2004, her complaint, filed on that day, was timely. We disagree.

The two-year statute of limitations for plaintiff's medical malpractice action expired on June 4, 2004, absent tolling. MCL 600.5805(6); MCR 1.108(3). Plaintiff served the NOI on June 4, 2004. The 182-day tolling period began running on June 5, 2005, MCR 1.108(1), and expired on Friday, December 3, 2004. Plaintiff was required to wait the entire 182-day period before filing suit. See *Burton v Reed City Hosp*, 471 Mich 745, 747-748; 691 NW2d 424 (2005). However, because the limitations period expired on June 4, 2004, no time remained to toll during the 182-day period. Therefore, when the 182-day period ended, the statute of limitations did not resume running. Plaintiff had no time remaining in which to file suit.³

Plaintiff's assertion that some portion of the limitations period remained after the NOI was served is without merit because the 182-day tolling period did not begin until June 4, 2004, had passed in its entirety. MCR 1.108(1). Moreover, contrary to plaintiff's assertion, the trial court's decision did not shorten the NOI period to 181 days. Plaintiff chose to wait until the last day of the limitations period in order to serve the NOI. The entire 182-day period elapsed in this case, but plaintiff's act of serving the NOI on the last day of the limitations period ensured that no time would remain in the limitations period when the 182-day period expired.

³ If plaintiff had served the NOI on June 3, 2004, the 182-day period would have commenced on June 4, 2004, and expired on December 2, 2004, with one day remaining in the limitations period. Under those circumstances, plaintiff could have timely filed her complaint on December 3, 2004.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald